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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 306

H. V. WATKINS, SR., FRED J. LOTTERHOS, AND AUBREY L. GREEN, EXECUTORS OF THE ESTATE OF RICHARD HOWARD GREEN, DECEASED, AND THE R. H. GREEN FOUNDATION, A CORPORATION,

Petitioners,

vs.

EUGENE FLY, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MISSISSIPPI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, CAUSE No. 10,591.

CECIL F. TRAVIS,
H. V. WATKINS, SR.,
VARDAMAN S. DUNN,
RALPH B. AVERY,
GARNER W. GREEN,
Jackson, Mississippi,
Counsel for Petitioners.

LOTTERHOS, TRAVIS & DUNN,
WATKINS & AVERY,
GREEN & GREEN,
Jackson, Mississippi,
Of Counsel.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Summary statement of matters involved and questions presented	2
Basis of jurisdiction	6
Reasons relied on for allowance of writ	6
Brief in support of petition for writ of certiorari	11
The opinions of the courts below	11
Applicable statutes	12
Jurisdiction	12
Statement of the case	12
Specifications of errors	12
Argument	14
The purpose of the Constitutional provision under consideration was to benefit the heirs at law and there is no prohibition or policy in Mississippi against the acquisition of real property by charities of the type here involved	14
It was competent for the heirs at law to waive the protection of the Constitutional provision involved and to consent that the property pass under the will to the charity	17
The holding of the Circuit Court of Appeals that title to the property devised to charity vested in the heirs immediately upon the death of the testator is erroneous as a basis for determining tax deductibility	24
The tax claim did not accrue upon death of the testator in the sense that no subsequent act of the heirs could defeat or affect that claim	30

Page

There is no real distinction between a devise which is said to be effective until renounced and one which is said to be ineffective until confirmed. The devise to charity in the case at bar is not uncertain to that degree recognized as defeating a tax deduction 34

A compromise was made during the course of administration of the estate, and the decree of the Probate Court adjudging that the property pass to the charity under the testator's will is controlling for tax purposes 41

Conclusion 42

Appendix A 43

Appendix B 44

Appendix C 48

Appendix D 49

Appendix E 50

Table of Cases Cited.

Bell v. *Mississippi Orphans Home,* 192 Miss. 205, 5 So. (2d) 214 ..... 15, 21, 35

Blackbourn v. *Tucker,* 72 Miss. 735, 17 So. 737 ..... 7, 14

Blair v. *Commissioner,* 300 U. S. 5, 81 L. Ed. 465 ..... 8, 42

Burdick v. *Commissioner of Internal Revenue,* (C. C. A. 2nd, 1941) 117 F. (2d) 972, certiorari denied, 314 U. S. 63 ..... 28, 37

Chassanoil v. *City of Greenwood,* 166 Miss. 848, 148 So. 781, Aff. 291 U. S. 584, 78 L. Ed. 1004, reh. den. 292 U. S. 601, 78 L. Ed. 1464 19

City v. *Marshall County,* 104 Miss. 752, 61 So. 703 19

City Bank Farmers' Trust Co. v. *U. S.* (C. C. A. 2nd), 74 F. (2d) 692 28

Commissioner of Internal Revenue v. *First National Bank of Atlanta* (C. C. A. 5th, 1939), 102 F. (2d) 129 ..... 6, 34, 37

Davison v. *Commissioner,* 81 F. (2d) 16 36

Dayhood v. *Neely,* 153 Miss. 14, 49 So. 440 18

Page

Dimock v. *Corwin* (C. C. A. 2nd, 1938), 99 F. (2d) 799, affirmed in 306 U. S. 363, 83 L. Ed. 763 ..... 6, 34
Elkin Henson Grain Co. v. *White*, 134 Miss. 203, 98 So. 531 18
Estate of Dwyer, 159 Cal. 680, 115 Pac. 242 ..... 17, 34
Ewell v. *Daggs*, 108 U. S. 143, 27 L. Ed. 682 8
Ex Parte Lange, 18 Wall. 163, 21 L. Ed. 872 8
Farmers' Loan & Trust Co. v. *Minnesota*, 280 U. S. 204, 74 L. Ed. 371 28
Fidelity & Deposit Company v. *Doughtry*, 181 Miss. 586, 179 So. 846 23
Freuler v. *Helvering, Commissioner of Internal Revenue*, 291 U. S. 35, 78 L. Ed. 634 ..... 8, 41
Gammons v. *Hassett*, 121 F. (2d) 229, certiorari denied, 314 U. S. 673 ..... 36, 40
Gandy v. *Public Service Corp.*, 163 Miss. 187, 140 So. 687 19
Gidden v. *Gidden*, 176 Miss. 98, 167 So. 785 22
Gift v. *Love*, 164 Miss. 442, 144 So. 562 22
Gordon v. *James*, 86 Miss. 719, 39 So. 18 22
Greely v. *Houston*, 148 Miss. 799, 114 So. 740 ..... 7, 15, 29
Humphrey v. *Millard* (C. C. A. 2nd, 1935), 79 F. (2d) 107 ..... 6, 34
Helvering v. *Grinnell*, 294 U. S. 153, 79 L. Ed. 825, 7, 25, 30, 31, 42
Helvering v. *Safe Deposit & Trust Company*, 316 U. S. 56, 86 L. Ed. 1266, 139 A. L. R. 1513 ..... 7, 30, 31, 42
Haggart v. *Wilczinski* (C. C. A. 5th), 143 F. 22 19
Humes v. *United States*, 276 U. S. 487 36
Huber v. *Freret*, 138 Miss. 238, 103 So. 3 19
In re Validation of Bonds of Clarke County, 187 Miss. 512, 193 So. 449 18
Ithaca Trust Company v. *United States*, 279 U. S. 151, 73 L. Ed. 647 37
Ingraham v. *Speed*, 30 Miss. 410 19
Knoern's Child v. *Commissioner*, 97 F. (2d) 213 36
Lyeth v. *Hoey*, 305 U. S. 188, 83 L. Ed. 119, 119 A. L. R. 410 ..... 7, 30, 31, 42
Mead v. *Welch* (C. C. A. 9th, 1938), 95 F. (2d) 617 ..... 6, 17, 34
Millwood v. *State*, 190 Miss. 750, 1 So. (2d) 582 19

Page

Natalbany Lumber Co. v. *Countiss,* 134 Miss. 511, 99 So. 262 18
National Bank of Greece v. *Savarika,* 167 Miss. 571, 148 So. 649 ..... 15, 16
National Bank of Greece v. *Savarika,* 167 Miss. 571, 148 So. 649 ..... 7, 15, 16
New Orleans, J. & G. N. R. Co. v. *Hemphill,* 35 Miss. 17 19
Pattison v. *Clingan,* 93 Miss. 310, 47 So. 403 19
Skinner Manufacturing Co. v. *Deposit Guaranty Bank,* 160 Miss 815, 133 So. 660 18
Smith v. *Chickasaw County,* 156 Miss. 171, 125 So. 96, Sug. Er. Ov. 156 Miss. 171, 125 So. 705 19
State ex rel. Whall v. *Saenger Theatres Corporation,* 190 Miss. 391, 200 So. 442 28
Trustees of Amherst College v. *Ritche,* 151 N. Y. 282, 37 L. R. A. 35
Thomas v. *Board of Trustees* (Ohio), 70 N. E. 896 35
Toy Toy v. *Hopkins,* 212 U. S. 542, 53 L. Ed. 645 ..... 8, 18
Tyler v. *United States,* 281 U. S. 497, 74 L. Ed. 991 28
Uterhart v. *United States,* 240 U. S. 598, 60 L. Ed. 819 ..... 8, 42
White v. *Miller,* 162 Miss. 296, 139 So. 611 19
Y. M. C. A. v. *Davis,* 264 U. S. 47, 68 L. Ed. 558 28
Weeks v. *Bridgman,* 159 U. S. 541, 40 L. Ed. 253 ..... 8, 18

STATUTES CITED.

Annotation: 37 L. R. A. pp. 324-327, and Zollman, American Law of Charities, pp. 45, 342, 343, and 349 17
Code of 1930, Sections 1643, 1691, 1694, 1695 22
Judicial Code, Section 240, as amended by Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A. 347 6
Mississippi Code 1930, Section 4169 16
Mississippi Code of 1930, Section 2125 23
Revenue Act of 1926 (44 Stat. 9, 26 U. S. C. A. 812(d)) 2
Section 302(f) of the Revenue Act of 1926 25
Zolman, American Law of Charities, pp. 45, 342, 343, and 349 14
44 Words and Phrases, Permanent Edition 18
25 R. C. L. 981, Section 229 28

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Petitioners,

vs.

EUGENE FLY, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MISSISSIPPI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, CAUSE No. 10,591.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

H. V. Watkins, Sr., Fred J. Lotterhos, and Aubrey L. Green, executors of the estate of Richard Howard Green, deceased, and the R. H. Green Foundation, a corporation, petitioners, as against Eugene Fly, Collector of Internal Revenue for the District of Mississippi, respondent, respectfully pray for the issuance of a writ of certiorari to

the United States Court of Appeals for the Fifth Circuit, Cause No. 10,591 on the docket of said court, in support whereof petitioners show the following:

A.

Summary Statement of Matters Involved and Questions Presented.

On October 1, 1936, Richard Howard Green, a resident of Jackson, Mississippi, died, leaving a will. He made certain bequests not here involved and also devised the residuum of his estate, including certain real properties, to his executors, as trustees, for charitable purposes. The R. H. Green Foundation, a corporation, one of the petitioners herein, was organized for the purpose of receiving the properties included in the residuary clause (R. 71-75). The gift to charity was for the expressed purpose of providing hospitalization for indigent negroes in Jackson, Mississippi, and vicinity. The charity was not a religious institution, nor were the properties to be used for religious purposes.

The controversy arises under Section 303(a) (3) of the Revenue Act of 1926 (44 Stat. 9, 26 U. S. C. A. 812(d)). The question is whether or not the estate is entitled to a deduction for the value of the real estate devised to charity, in view of Section 269, *Mississippi Constitution of 1890,* providing that such a devise "shall be null and void, and the heir at law shall take the same property so devised or bequeathed, as though no testamentary disposition had been made." (For full text, see Appendix E.)

The Revenue Act of 1926 allows as a deduction from the gross estate of a decedent the value of a devise to charities of the type here involved, and this is conceded by respondent. The Constitutional provision referred to is not a mortmain act and its provisions are for the sole benefit of the heirs at law.

There were two heirs at law. The heirs at law did not accept possession of the real properties devised to charity and they never at any time exercised any control thereover or any of the incidents of ownership therein nor did they ever attempt to do so, and the real property actually passed to the charity, as provided for in the last will and testament.

The petition for probate of the will, filed October 5, 1936, alleged that the will was the true last will and testament of the deceased (R. 49). A decree was entered on the petition, admitting the will to probate and adjudging that the will was fully and legally established, that the testator was of right and in law entitled to make the same and that it was, in all particulars, agreeable to and in strict conformity with the law (R. 50).

Thereupon, the executors duly qualified and took possession of the assets of the estate and also the real property devised to them, as trustees under the will, for the benefit of the charity. The real property devised to charity was consistently treated throughout the administration of the estate as property belonging to the charity under the last will and testament of Mr. Green, and the executors, as trustees for the charity, under directions and orders of the Probate Court, took possession of the real properties and exercised exclusive control thereover and all of the incidents of ownership therein (R. 49-58). The executors and trustees never admitted that the devise to charity was invalid, but consistently maintained throughout the administration that the devise was valid. The heirs at law never contended that the devise was invalid and never interposed any objection whatsoever thereto.

In February, 1937, the executors filed a petition requesting leave of court to accept a quitclaim deed from the two sole heirs at law and, as a basis for this, recited that, "A question of doubt has arisen as to the validity of said charitable bequests," referring to the gift of real estate to

the charity. The petition also recited that suggested invalidity "is not admitted by your executors and trustees" (R. 27-28). The petition also recited that a compromise had been reached; that one of the heirs was to be paid the amount of her probated claim as to which a doubt had arisen and in return the two heirs at law were to waive any claim to the real estate devised to charity. This compromise was approved by the court (R. 32), and the quitclaim covering the real property devised to charity was executed on March 4, 1937 (R. 33), in order that the purpose and intent of the testator might be effectuated, notwithstanding the Constitutional and statutory provisions under consideration. It is noted that the quitclaim deed was executed approximately four months after the testator's death and before the filing of the tax return by the estate in December, 1937, and during this period of time and thereafter, until the closing of the estate approximately three years later, the real property was possessed, controlled, used and enjoyed by the executors, as trustees, for the benefit of the charity.

The final account of the executors listed the real estate as belonging to the charity. The final decree of the court confirmed the final account and ordered that the property pass to the charity under the last will and testament of Mr. Green (R. 55-58).

It is stipulated in this record (R. 73) that:

> "Said grantors (the heirs at law) by such quitclaim deed *waived any claim of title* and *validated the title* of the real property in the executors who *made claim to it under and pursuant to the provisions of XI of the will.*" (Emphasis ours.)

Subsequent to the execution of the quitclaim deed, and on December 31, 1937, the estate filed its tax return, which included the value of the real estate embraced in the devise

to charity, and paid an estate tax on account of the real estate, amounting to $9,931.66. Thereafter, a claim was made for a refund and denied, whereupon, this suit was filed to recover that portion of the taxes so paid, together with accrued interest.

The respective contentions of petitioners on the one hand and respondent on the other, together with the decision of the Circuit Court of Appeals thereon, may be summarized as follows:

Respondent contended that Section 269 of the State Constitution rendered the devise to charity wholly meaningless and, in effect, non-existent, as though it had not been contained in the will; that the tax claim accrued upon death and that no subsequent act of the heirs could defeat or affect that claim and that, despite the waiver implicit in the quitclaim deed, the real property passed by the act of the heirs and not by virtue of the testamentary devise. The decision of the Circuit Court of Appeals adopted this theory.

On the other hand, the theory of petitioners' right of recovery was that the prohibition contained in the Constitution of Mississippi against charitable devises was for the benefit of the heirs at law of the testator, and that since the heirs had interposed no objection but had executed a waiver in the form of a quitclaim deed, in order to reject any rights or title which might otherwise have accrued under the Constitutional provision and in order to carry out the intention of the testator, the charitable devise was lawful and deductible from the gross estate under the Revenue Act of 1926.

The decision of the Circuit Court of Appeals, taking the original opinion and the opinion on petition for rehearing together, is planted upon the proposition that whereas the heirs at law had a right to waive their claims under the Constitutional provision and reject title to the real estate,

the tax claim of the government matured upon death and no subsequent events or acts of the heirs could affect that claim. (For full text of Opinions, see Appendix B and Appendix C.) This decision, we submit, is in conflict with decisions of this Court, with decisions of other Circuit Courts, with decisions of the Supreme Court of Mississippi, and with the overwhelming general weight of authority.

B.

Basis of Jurisdiction.

The original judgment of the Fifth Circuit Court of Appeals was entered on June 4, 1943, and its judgment on petition for rehearing was entered July 7, 1943. Jurisdiction is invoked under Judicial Code, Section 240, as amended by Act of February 13, 1925, 43 Stat. 938, 28 USCA 347. Copies of the opinions to be reviewed are referred to in the subjoined brief and included in the appendix thereto.

C.

Reasons Relied On for Allowance of Writ.

1. The decision of the Circuit Court of Appeals is in conflict with its own prior decisions and with the decisions of other Circuit Courts of Appeals on the same matter.

The decision conflicts with *Commissioner of Internal Revenue* v. *First National Bank of Atlanta*, (CCA 5th, 1939), 102 F. (2d) 129; *Humphrey* v. *Millard*, (CCA 2nd, 1935), 79 F. (2d) 107; *Mead* v. *Welch*, (CCA 9th, 1938), 95 F. (2d) 617; and *Dimock* v. *Corwin*, (CCA 2nd, 1938), 99 F. (2d) 799, affirmed in 306 U. S. 363, 83 L. Ed. 763. All of these cases involved identical questions under similar state statutes declaring gifts to charities "void" in certain circumstances. The cases referred to cannot be distinguished.

2. The Circuit Court of Appeals has decided an important question of local law in conflict with local decisions.

In *Blackbourn* v. *Tucker*, 72 Miss. 735, 17 So. 737, it was held that the purpose of the Constitutional provision here involved was to prevent one from being charitable at the expense of his heirs at law, thus demonstrating that the provision was to benefit the individuals who are the testator's heirs at law. To the same effect are: *Greely* v. *Houston*, 148 Miss. 799, 114 So. 740, and *National Bank of Greece* v. *Savarika*, 167 Miss. 571, 148 So. 649. A similar holding is found in *Bell* v. *Mississippi Orphans Home*, 192 Miss. 205, 5 So. (2d) 214. The decision of the Circuit Court of Appeals recognizes the rule involved but the court's conclusion would destroy the principle thereby established.

3. The Circuit Court of Appeals has decided a Federal question in a way which is in conflict with applicable decisions of this Court.

(a) *Helvering* v. *Grinnell*, 294 U. S. 153, 79 L. Ed. 825; *Lyeth* v. *Hoey*, 305 U. S. 188, 83 L. Ed. 119, 119 A. L. R. 410; *Helvering* v. *Safe Deposit & Trust Company*, 316 U. S. 56, 86 L. Ed. 1266, 139 A. L. R. 1513, establish three controlling propositions: (1) that property does not pass to an individual unless he accepts the same and such property never passes if title is rejected, and (2) that tax claims do not mature upon death in the sense that such claims may not thereafter be affected, but that events subsequent to a decedent's death, events controlled by his beneficiaries, can determine the inclusion or not of certain assets within the decedent's gross estate under the Revenue Act, and (3) that a compromise made in the course of the administration will be given effect as the established basis for taxation. The decision of the Circuit Court of Appeals conflicts with these principles.

(b) The decision is also in conflict with the announcement in *Weeks* v. *Bridgman,* 159 U. S. 541, 40 L. Ed. 253, and *Toy Toy* v. *Hopkins,* 212 U. S. 542, 53 L. Ed. 645, to the effect that things are often said to be void which are without validity until confirmed, citing among other authorities *Ewell* v. *Daggs,* 108 U. S. 143, 27 L. Ed. 682, and *Ex Parte Lange,* 18 Wall. 163, 21 L. Ed. 872.

(c) The decision in this case conflicts with the holding of the United States Supreme Court in the case of *Freuler* v. *Helvering, Commissioner of Internal Revenue,* 291 U. S. 35, 78 L. Ed. 634, holding that the decree of a trial court having jurisdiction over the subject matter and the parties, until reversed or overruled, establishes property rights and is controlling upon questions of title and rights in property sought to be taxed and to this extent is binding in tax litigation involving the same subject matter. See also *Uterhart* v. *United States,* 240 U. S. 598, 60 L. Ed. 819, and *Blair* v. *Commissioner,* 300 U. S. 5, 81 L. Ed. 465.

4. The question presented in this case is of general importance in the administration of the Federal Estate Tax Law.

5. And other reasons appearing and to be assigned on the hearing.

WHEREFORE, petitioners pray for writ of certiorari from this honorable Court directed to the Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and to send to this Court, for its review and determination, on a day certain therein named, a full and complete transcript of the record and all proceedings in Cause No. 10,591, entitled H. V. Watkins, Sr., et al., Executors, etc., *v.* Eugene Fly, Collector of Internal Revenue for the District

of Mississippi, and that said judgment of said court may be reversed and petitioners afforded appropriate relief.

Respectfully submitted,

CECIL F. TRAVIS,
H. V. WATKINS, SR.,
VARDAMAN S. DUNN,
RALPH B. AVERY,
GARNER W. GREEN,
Jackson, Mississippi,
Counsel for Petitioners.

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